

Iowa Drainage Law: A Legal Review

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This article reviews private drainage law in the State of Iowa. A future article will address legal issues impacting drainage districts.

Iowa land is some of the most productive in the world. As settlers began arriving to the area, they encountered many swamps and sloughs making agriculture production difficult. To address the excess water, individual property owners drained their land using underground pipes, pumps, and open ditches to move excess surface water away from cropland.

In 1908, the Iowa Constitution was amended to allow the Legislature to pass laws concerning the construction of tiling and drainage districts.^[i] Many of these laws are codified in Iowa Code chapter 468. In addition to the Iowa

Constitution and the Iowa Code, drainage systems in wetlands are also regulated by federal law and common law. Landowners now have a legal mechanism to manage surface water flow with their neighbors on a larger scale and may also enter into private drainage agreements.

Today, damage from surface water is still a concern in both rural and urban areas. In addition to state law, landowners should determine whether draining their property can be a violation of federal law such as the Clean Water Act or Swampbuster, which can render a producer ineligible for many USDA programs and benefits.

Overview

Today, landowners in the state have the right to drain their land with the natural flow of water and discharge excess water into natural watercourses.^[ii] Landowners who intend to construct a levee, ditch, or underground tile or drain for agricultural purposes or to improve water drainage across someone else's property may file an application with the county auditor.^[iii] The auditor will send notice to the other party and set a time for a hearing before the county board of supervisors to determine the merits of the application. The board of supervisors must determine whether the proposed drainage scheme is beneficial for sanitary, agriculture, or mining purposes.^[iv]

Historically, common law gave landowners the right to defend themselves from surface water flowing onto their property and placed no obligation to take on additional water from neighboring land. Known as the *common enemy doctrine*, this rule gave landowners a right to repel waters from entering onto their property.^[v] Currently, that doctrine has been replaced with a modified civil law which creates a servitude on lower lands to take on water from their uphill neighbor.

Iowa Code § 468.621 states:

Owners of land may drain the land in the general course of natural drainage by constructing or reconstructing open or covered drains, discharging the drains in any natural watercourse or depression so the water will be carried into some other natural watercourse, and if the drainage is wholly upon the owner's land the owner is not liable in damages for the drainage unless it increases the quantity of water or changes the manner of discharge on the land of another.

Under this law, properties at higher elevation have a right to benefit from the natural flow of water downhill and are not liable for any damages caused by this.^[vi] Over the past century, courts have determined what duties landowners have under the natural flow doctrine.

Elevation Determines the Dominant and Servient Estate

The rights and obligations of an individual landowner are determined by the relative elevation of the properties in a dispute. The dominant estate is the land located at a higher elevation, while the servient estate is located at a lower elevation. This is a fact-based question which can at times be determined by a simple observation.^[vii] Other times,

the elevation may only vary slightly and a professional engineer or land surveyor may be required to determine the relative heights of the properties.^[viii] A parcel of land can be both a dominant estate and a servient estate depending on the elevation of the other properties in the dispute.

The flow of water does not determine which property is the dominant or servient estate.^[ix] However, it can help determine which estate is at a higher elevation.^[x] For example, when determining whether a parcel of land is the dominant or servient estate, Iowa courts have considered water pooling on a property to be indicative of the elevation between the two properties.^[xi] The flow of water is therefore a helpful tool, but not the main factor in this determination.

Legal Rights and Duties and Natural Easements to Drain Surface Water

The rights and duties of landowners to drain and divert surface water has been a source of great controversy between adjoining neighbors since the law was first created. Landowners injured by the drainage activities of their neighbor can recover under the theories of negligence, nuisance, and trespass.

At the center of this modified civil law regarding individual drainage is the fact that water naturally runs downhill.^[xii] Because of this, the owner of a dominant estate has a natural and legal easement to drain surface waters through natural watercourses onto the servient estate.^[xiii] The servient estate has a duty to accept water from the dominant estate and cannot obstruct the natural flow of surface water. Natural watercourses include not only traditional waterways such as open ditches, swales or depressions in the ground where water naturally flows, but also underground tiling systems.^[xiv]

Under the natural flow doctrine, the dominant estate must exercise ordinary care and cannot cause substantial damage to the downhill neighbor. At the same time, the servient estate cannot interrupt the natural flow of water or cast water back onto the dominant estate causing injury.^[xv]

Dominant Estate Rights

The dominant estate is entitled to the natural benefit of being located at a higher elevation. The dominant estate has the right to have surface waters flow in the natural course of drainage without liability for damage.^[xvi]

In *Gannon v. Rumbaugh*, a farmer removed a levee and built a dam.^[xvii] After heavy rains, the adjoining farmlands to the north and south claimed this action caused their farm fields to flood and brought a lawsuit against the farmer. In this case, one of the injured plaintiffs owned land dominant to the farmer and the second plaintiff owned land servient to the farmer. After determining the relative elevation of each property, the court found that the first plaintiff, as the dominant estate, had the right to have water naturally flow onto the servient estate. Because the grading work done by the farmer made the water drain slower, the farmer was negligent for causing this damage.

The farmer's land was also dominant to the second plaintiff. As the dominant estate, it could not cause surface water to flow outside its natural course. However, the levee modification only reverted surface water flow back to its natural path and amount. Therefore, the farmer was not liable for any damages the servient estate sustained.

The dominant estate also has the right to drain surface water onto the servient estate, through open ditches and depressions or covered drains and tiling systems. In *Countryman v. Lex*, a trust owned a farm field which had tiling running beneath it. The drainage tile ran underneath the downhill neighbor's adjoining land as well.^[xviii] At some point, the neighbor's trees grew over the tile line. The roots damaged the tiling which prevented water from the trust's property from draining off the property. Without adequate drainage, water started to pool and damage crops in the trust's field.

The servient landowner claimed the trust did not have a common law easement to drain water using the tiles underneath the servient estate. The court found the trust did not need a common law easement to drain water through the neighbor's tiles because the trust, as the dominant estate, possessed a legal and natural easement to build a drain to carry surface water away. Therefore, the servient estate could not obstruct the natural waterway and was ordered to replace the tile.

Much of Iowa land is part of a drainage district. Drainage districts are created under the law and have many rights including the ability to divert water outside of the natural course of drainage. In *McKeon v. Brammer*, the court considered the rights of a dominant estate to drain surface water onto servient estate in a drainage district.^[xix] After the owner of the servient estate blocked tiling which allowed surface water from the dominant estate to flow onto the servient estate, the dominant estate sought an injunction to order the servient estate to remove the barrier so the dominant estate could exercise its right to drain surface water.

The servient landowner claimed it had not violated its duty to take on surface water because it was located in a drainage district and the system was already overtaxed. Bringing in anymore land would cause damage to the existing property in the drainage district. However, many years before, the dominant estate had obtained a common law prescriptive easement to construct tile lines and drain water onto the servient estate.

When water flows from a dominant estate onto a servient estate, it becomes the water of the servient estate.^[xx] Here, the tiling system between the two properties did not actually connect and there was no evidence of an additional burden on the district. Because of this, the right of the dominant estate to drain surface water was not lost due to the existence of the drainage district, and the servient estate could not block the tile line.

Third, a dominant estate may cast additional water onto lower property as long as it does not cause substantial damage. The servient estate will have the burden of proof to show that the dominant estate's drainage activity caused additional water to flow onto the property and that there were actual damages. If the only evidence of additional water is after heavy rain or snow, that is insufficient to meet this burden of proof.^[xxi]

Dominant Estate Obligations

A dominant estate is given many rights as the property at higher elevation. However, there are limitations. A dominant estate cannot exercise its drainage rights if the servient estate obtains a counter easement. And it cannot cause an increase or change in flow of water which substantially injures the servient estate.

If a servient estate builds a barrier to repel surface water from entering onto its land and the dominant landowner consents for at least ten years, that dominant estate loses the right to demand that the barrier be removed.^[xxii] In *Fennema v. Menninga*, a dominant landowner brought a lawsuit against his adjoining neighbor claiming the neighbor built and maintained a dike which caused flooding damage.^[xxiii] As the dominant landowner, he sought to have the barrier removed so water could flow naturally onto the downhill property. The servient estate's predecessor had built the dike more than 20 years earlier. Both the dominant landowner and his predecessor knew of the dike and never complained, consequently granting implied consent. Therefore, the dominant landowner lost the right to drain surface water onto the servient estate and his request for an injunction to remove the barrier was barred.

Servient Estate Rights

While the servient estate owes a servitude to take on surface water, there is no blanket policy prohibiting a servient estate from seeking damages for costs incurred.^[xxiv] Additionally, the servient estate can drain its own land to avoid damage from excess water so long as it does not cause damage to the dominant estate.

The servient estate has a right to relief if the dominant estate casts additional water onto it or in an unnatural manner and causes substantial damage. In *O'Tool v. Hathaway*, a terrace break on a dominant landowner's farm after heavy rains caused flooding and damage to the downhill neighbor's home.^[xxv] The court found if the manner or method of drainage substantially changes and actual damages result, the servient landowner is entitled to relief. A terrace's purpose is to prevent soil erosion by collecting excess rainfall instead of allowing it to naturally run downhill and cause damage. Additionally, a Soil Conservation Specialist testified that a terrace substantially changes the manner and method of water drainage.

There was substantial evidence of damages as witnesses described a "tidal wave" of water that came down the hill after the break which resulted in a wall in the lower level of the house collapsing and five feet of water in the basement. The farmer claimed he had not built or maintained the terrace negligently. The court agreed, but found the farmer had not exercised ordinary care because this was foreseeable due to the location of the terrace directly above the servient landowner's home and the fact that terrace breaks are not uncommon. Because of this, it was not reasonable to alter the flow of water in this manner.

Servient Estate Obligations

While the servient estate may divert water on its land, it also has the duty to accept water onto the estate and not obstruct the natural flow of water. A servient estate which violates these duties will be liable for damages and ordered to abate the nuisance.^[xxvi]

A servient estate must allow water to flow naturally onto the estate.[[xxvii](#)] In *Sobotka v. Salamah*, the dominant estate drained land through “dead furrows.” After flooding, the owner cleaned and expanded the furrows. The servient estate then plowed dirt against the furrows twice in a two or three-week period, blocking surface water. Here, there was no question the servient estate’s action prevented the dominant estate from harvesting 18 acres of waterlogged crops. The trial court found the servient estate negligent and awarded compensatory damages, punitive damages, and ordered the servient estate to abate the nuisance. The court of appeals reversed the award of punitive damages finding there was no evidence of malice or a reckless disregard for another’s rights. Compensatory damages to reimburse for costs incurred are common in these drainage disputes, as well as injunctions ordering a landowner to refrain from committing the damaging action. But, unless there is some form of maliciousness, punitive damages will likely not be awarded.

A servient estate does not violate its servitude to the dominant estate if it does not cause actual harm.[[xxviii](#)] In *Sojka v. Breck*, after a flood destroyed the homes of two adjoining properties, the dominant estate was the first to rebuild. As the servient landowner began construction, the workers used dirt fill to hold up the foundation walls and to prevent shifting until the house was finished. After the relationship between the two neighbors soured, the dominant landowner filed a nuisance lawsuit claiming that the new home unlawfully altered the flow of water. Before the house was completed, another flood hit the area and caused erosion damage to the downhill neighbor.

A private nuisance is “an actionable interference with a person's interest in the private use and enjoyment of the person's land.”[[xxix](#)] The dominant estate claimed the servient landowner’s surface water drainage interfered with the use and enjoyment of their property and that any change in the flow of water caused by the servient estate was unreasonable behavior. However, there was no evidence that the grading work done by the servient estate caused any damage. The only damage the dominant land experienced was due to the same storm that damaged the servient landowner’s home and many other homes in the area. Additionally, this was a temporary nuisance that would abate upon completion of the reconstruction. Because this was a temporary and minor nuisance, the servient estate was not liable for any nuisance claimed by the dominant estate.[[xxx](#)]

Common Law Drainage Easements

In addition to the statutory easement created under Iowa Code chapter 468, drainage easements can also be created under common law through an express written agreement, prescription, or by implication. Express easements are in writing and can be used when private landowners intend to enter into a private drainage agreement. An easement by prescription is created when someone uses another’s land under color of right openly, notoriously, and hostilely for a continuous period of 10 years or, in some drainage cases, when the servient estate consents to the use of the land and that use has continued for more than 10 years.[[xxxi](#)] An implied easement is created one when piece of land is divided, but one of the new parcels needs to use the other land. This could happen when a parcel of land is dependent on the underground tiling that originally served the whole property.”[[xxxii](#)]

While common law easements may be created in different ways, they all receive the same legal treatment. Drainage agreements are easements appurtenant and run with the land, not the individual landowner. Therefore, they are

binding upon subsequent owners of that land.^[xxxiii] Even if a purchaser does not have notice of the easement in underground tiling or some other drainage mechanism, the court will still uphold its validity.^[xxxiv]

An easement cannot be increased or extended without the consent of the servient estate.^[xxxv] In *Halsrud v. Brodale*, four property owners entered in a written agreement to create a private drainage district. This created express easements by written grant. The agreement stated that no other land would be allowed to connect to the system. More than 35 years later, the current owner of one of the properties purchased an adjoining parcel of land. This land was dominant to both his original property and another property owner in the private drainage district. He installed tile lines on the newly acquired, dominant property and connected the tile to the pre-existing drainage system. The servient landowner believed that the private drainage system could not handle the extra water and blocked the drain at the boundary line.

Neither of the parties were the original landowners, but they still obtained the land with the express easement. The owner of the new dominant estate claimed that he had the statutory right to drain water onto lands of lower elevation and the servient estate could not obstruct the flow of water. The Iowa Supreme Court disagreed, finding that a statutory right can be waived by a written contract and here, the agreement forbade new lands from using the tiling system. Therefore, the dominant estate could still drain surface water onto the servient estate, which the servient estate could not reject, but it could not extend the easement and connect to the private tile system.

Private drainage systems built after July 1, 1969, must be recorded with the county recorder.^[xxxvi] The record may include details such as the owner's name, description of the land, the date when the drainage system was established, and the type of tile used. These drainage records are not part of the title to the property.^[xxxvii]

A landowner may also abandon an easement. To do so, there must both be an intent to abandon and the act of abandoning.^[xxxviii] In *Pascal v. Hynes*, a landowner obtained a prescriptive easement to drain water onto his neighbor's property. Eventually, the landowner's daughter-in-law inherited the property and soon after the neighbors blocked the tile line. An employee removed the obstruction, but the neighbor replaced it. Possibly to avoid more controversy, the daughter-in-law began to construct new tiling to drain her property. Before the project was completed, the neighbors brought a legal action claiming that she had abandoned the easement. While the daughter-in-law did temporarily acquiesce, this was not enough to be considered relinquishment of the easement. Therefore, no abandonment occurred.

Double Damages

A common inquiry is whether a landowner who is injured due to the removal or destruction of a levee is entitled to statutory "double damages." Iowa has a law which provides that any person who intentionally breaks down a levee or obstructs any ditch, drain, or other drainage improvement "authorized by law" is liable for double damages.

^[xxxix] The affected land must be part of an active drainage district in order to recover under the statute.^[xl]

Questions and Answers

Question One

A farmer owns a parcel of land. He sells the half at the lowest elevation and keeps the other half at the highest elevation. The new landowner, as the servient landowner, is frustrated with the natural drainage of the land and builds underground tiling to drain the water. Now, the farmer's portion of the land experiences flooding. Does he have any remedies?

Answer One

Unless there is a previous drainage system creating an implied easement, the new landowner is the servient estate and cannot block water from coming onto the property from the dominant estate.

Question Two

Two siblings own farmland which is rented out to a tenant. The land is having issue draining and the siblings decide to tile the land to run onto pastureland downhill. Do the siblings need to obtain permission to divert the flow of the water onto the land?

Answer Two

Iowa Code § 468.621 states that property owners may drain their land with open or covered drains in the general course of the natural drainage. A dominant landowner on higher ground may carry water from their land to the land of lower elevation, the servient estate. However, if there is substantial damage or burden on the servient estate, the dominant estate will likely be liable for the damage. The siblings would not need permission from the pastureland owner, but if there is a substantial increase in water flow and damages occur, the siblings may be liable.

Question Three

Two neighbors do not get along. The neighbor digs a ditch on the boundary line to obstruct water from entering into his land. This prevents water from running off the uphill property. Is this allowed?

Answer Three

The first step is to determine which property is at higher elevation. While the flow of water does not determine which estate is the dominant or servient estate, it would appear that the ditch obstructs the flow of water and is the servient estate. If the neighbor is the servient estate and the ditch causes damages to the farmland, a court will likely order the neighbor to remove the ditch.

[i] Iowa Const. Art. 1 § 18 (1904).

[ii] Iowa Code § 468.621 (2020).

[iii] Iowa Code § 468.600.

[iv] *Id.*

[v] *Hume v. City of Des Moines*, 125 N.W. 846, 848 (Iowa 1910).

[vi] *See O'Tool v. Hathaway*, 461 N.W.2d 161, 163 (Iowa 1990)

[vii] *Countryman v. Lex*, 2019 WL 3317352, *2 (Iowa Ct. App. 2019).

[viii] *See generally, Dodd v. Blezek*, 66 N.W.2d 104 (Iowa 1954); *Sobotka v. Salamah*, 2013 WL 104794, *3.

[ix] *Moody v. Van Wechl*, 402 N.W.2d 752, 757 (Iowa 1987).

[x] *Dodd*, 66 N.W.2d at 108.

[xi] *Sojka v. Breck*, 2013 WL 1453241, *5 (Iowa Ct. App 2013).

[xii] *Jontz v. Northup*, 137 N.W. 1056, 1057 (Iowa 1912)

[xiii] *Whitthauer v. City of Council Bluffs*, 133 N.W.2d 71, 74-75 (Iowa 1965).

[xiv] *Heinse v. Thorborg*, 230 N.W. 881, 881 (Iowa 1930).

[xv] *Lessenger v. City of Harlan*, 168 N.W. 803, 806 (Iowa 1918).

[xvi] *Grace Hodgson Trust v. McClannahan*, 569 N.W.2d 397, 399 (Iowa Ct. App. 1997).

[xvii] *Gannon v. Rumbaugh*, 772 N.W.2d 258 (Iowa Ct. App 2009).

[xviii] *Countryman*, 938 N.W.2d at 718.

[xix] *McKeon v. Brammer*, 29 N.W.2d 518, 527 (Iowa 1947).

[xx] *Johannsen v. Otto*, 282 N.W. 334 (Iowa 1938).

[xxi] *Cundiff v. Kopseiker*, 61 N.W.2d 443 (Iowa 1953).

[xxii] *Fennema v. Menninga*, 19 N.W.2d 689, 691 (Iowa 1945).

[xxiii] *Id.* at 690

[xxiv] *Downey v. Phelps*, 208 N.W. 499, 501 (Iowa 1926) (quoting *Matteson v. Tucker*, 107 N.W. 600, 602 (Iowa)).

[xxv] *O'Tool*, 461 N.W.2d at 161.

[xxvi] *Sobotka v. Salamah*, 2013 WL 104794, *3 (2013).

[xxvii] *Id.*

[xxviii] *Sojka*, at *5.

[xxix] *Martins v. Interstate Power Co.*, 652 N.W.2d 657, 660 (Iowa 2002) (quoting *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996)

[xxx] *Sojka*, at *5

[xxxi] *Maisel v. Gelhaus*, 416 N.W.2d 81, 87 (Iowa Ct. App 1987).

[xxxii] *McKeon*, 29 N.W.2d at 522.

[xxxiii] *Halsrud v. Brodale*, 72 N.W.2d 94, 98 (Iowa 1955).

[xxxiv] *McKeon v.*, 29 N.W.2d at 518.

[xxxv] *Halsrud v. Brodale*, 72 N.W.2d 94, 97 (Iowa 1955).

[xxxvi] Iowa Code § 468.623.

[xxxvii] Iowa Code § 468.627.

[xxxviii] *Pascal v. Hines*, 152 N.W. 26, 27 (Iowa 1915).

[xxxix] Iowa Code § 468.148 (2020).

[x] *Gannon*, 772 N.W.2d at 26; *Sobotka*, 2013 WL 1453241 at *5.

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